RECORDS AND BRIEFS

No. 15-1439

IN THE
Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the
Court of Appeal of the State of California,
First Appellate District

BRIEF FOR PETITIONERS

BORIS FELDMAN
Counsel of Record
IGNACIO E. SALCEDA
GIDEON A. SCHOR
AARON J. BENJAMIN
WILSON SONSINI GOODRICH & ROSATI PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300
boris.feldman@wsgr.com

NEAL KUMAR KATYAL
FREDERICK LIU
DANIEL J.T. SCHUKER
ALLISON K. TURBIVILLE
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. § 77v(a), that allege only claims under the Securities Act of 1933.

PARTIES TO THE PROCEEDING

Cyan, Inc., Mark A. Floyd, Michael W. Zellner, Michael L. Hatfield, Paul A. Ferris, Promod Haque, M. Niel Ransom, Michael J. Boustridge, and Robert E. Switz, petitioners here, were the petitioners in the California Court of Appeal.

Beaver County Employees Retirement Fund, Retirement Board of Allegheny County, Delaware County Employees Retirement System, and Jennifer Fleischer, respondents here, were the real parties in interest in the California Court of Appeal.

The Superior Court of California, County of San Francisco, respondent here, was the respondent in the California Court of Appeal.

RULE 29.6 DISCLOSURE STATEMENT

Cyan, Inc., was a publicly held company when this action was filed. On August 3, 2015, Cyan, Inc., was acquired by Ciena Corporation, a publicly held company, and has since ceased to exist as a corporate entity. Other than Ciena Corporation, there is no parent or publicly held company owning 10% or more of Cyan, Inc.'s stock.

Ciena Corporation has no parent corporation. BlackRock, Inc., is a publicly held company that owns 10% or more of Ciena Corporation's stock. No other publicly held company owns 10% or more of Ciena Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Statutory Background 2

B. Respondents' Suit 8

SUMMARY OF ARGUMENT 10

ARGUMENT 14

I. SLUSA DIVESTED STATE COURTS OF CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS IN COVERED CLASS ACTIONS 14

II. ALTERNATIVE INTERPRETATIONS OF SLUSA SHOULD BE REJECTED 31

A. Respondents' Interpretation Cannot Be Squared With SLUSA's Text, Structure, History, Or Purposes 31

B. Though Better Than Respondents', The United States' Interpretation Is Still Not The Best 39

CONCLUSION 44

ADDENDUM 1a

TABLE OF AUTHORITIES

Page

CASES:

Advocate Health Care Network v. *Stapleton*, 137 S. Ct. 1652 (2017) 14

Buelow v. *Alibaba Grp. Holding Ltd.*, No. CIV 535692 (Cal. Super. Ct. Apr. 1, 2016) 27

Burgess v. *United States*, 553 U.S. 124 (2008) 34, 35

Caraco Pharm. Labs., Ltd. v. *Novo Nordisk A/S*, 566 U.S. 399 (2012) 34

Corley v. *United States*, 556 U.S. 303 (2009) 32

Credit Suisse Sec. (USA) LLC v. *Billing*, 551 U.S. 264 (2007) 9

Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 2, 11, 16, 18, 36

Hertz Corp. v. *Friend*, 559 U.S. 77 (2010) 31

Hung v. *iDreamSky Tech. Ltd.*, No. 15-cv-2514, 2016 WL 299034 (S.D.N.Y. Jan. 25, 2016) 19

In re Pac. Biosciences of Cal. Inc. Sec. Litig., No. CIV 509210 (Cal. Super. Ct. May 24, 2012) 27

Kircher v. *Putnam Funds Tr.*, 547 U.S. 633 (2006) 7, 17, 32, 40, 41

Knox v. *Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009) 19

TABLE OF AUTHORITIES—Continued

Page

Kokesh v. *SEC*,
137 S. Ct. 1635 (2017) 2

Levin v. *Commerce Energy, Inc.*,
560 U.S. 413 (2010) 30

Luther v. *Countrywide Fin. Corp.*,
125 Cal. Rptr. 3d 716 (Ct. App. 2011) 9, 10

Merrill Lynch, Pierce, Fenner & Smith Inc.
v. *Dabit*, 547 U.S. 71 (2006) ..... *passim*

Merrill Lynch, Pierce, Fenner & Smith Inc.
v. *Manning*, 136 S. Ct. 1562 (2016) 31, 34

Mims v. *Arrow Fin. Servs., LLC*,
565 U.S. 368 (2012) 38

Omnicare v. *Laborers Dist. Council Constr.*
Indus. Pension Fund,
135 S. Ct. 1318 (2015) 2

Tafflin v. *Levitt*,
493 U.S. 455 (1990) 38

United States v. *Naftalin*,
441 U.S. 768 (1979) 2

United States v. *Quality Stores, Inc.*,
134 S. Ct. 1395 (2014) 15

United States v. *R.L.C.*,
503 U.S. 291 (1992) 35

STATUTES:

Private Securities Litigation Reform Act of
1995, Pub. L. No. 104-67, 109 Stat. 737 4

Securities Act of 1933, ch. 38, 48 Stat. 74 2

§ 22(a), 48 Stat. 86-87 3

15 U.S.C. § 77a 2, 8, 15

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. § 77b(a)(4) 2
15 U.S.C. § 77e 3
15 U.S.C. § 77e(a) 2
15 U.S.C. § 77e(b) 2
15 U.S.C. § 77e(c) 2
15 U.S.C. § 77g 2
15 U.S.C. § 77j 2
15 U.S.C. § 77k(a) 3
15 U.S.C. § 77k(f) 6
15 U.S.C. § 77*l*(a)(1) 3
15 U.S.C. § 77*l*(a)(2) 3
15 U.S.C. § 77p(b) ..... *passim*
15 U.S.C. § 77p(c) 7, 17
15 U.S.C. § 77p(d) 7
15 U.S.C. § 77p(f) 16
15 U.S.C. § 77p(f)(2) 16, 31, 42
15 U.S.C. § 77p(f)(2)(A)(i)(I) 8
15 U.S.C. § 77p(f)(2)(A)(i)(II) 8
15 U.S.C. § 77p(f)(2)(A)(ii) 8
15 U.S.C. § 77p(f)(3) 8, 17, 24
15 U.S.C. § 77r(b)(1) 8, 17, 24
15 U.S.C. § 77r(b)(2) 8
15 U.S.C. § 77v(a) ..... *passim*
15 U.S.C. § 77z-1 37
15 U.S.C. § 77z-1(a) 5
15 U.S.C. § 77z-1(a)(1) 6, 26, 27, 29

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. § 77z-1(a)(2)(A)(ii) 5, 26
15 U.S.C. § 77z-1(a)(2)(A)(vi) 26
15 U.S.C. § 77z-1(a)(3) 5
15 U.S.C. § 77z-1(a)(3)(A)(i) 5
15 U.S.C. § 77z-1(a)(3)(B)(iii)(I) 5
15 U.S.C. § 77z-1(a)(4) 5
15 U.S.C. § 77z-1(a)(5) 6
15 U.S.C. § 77z-1(a)(6) 5
15 U.S.C. § 77z-1(a)(7) 6
15 U.S.C. § 77z-1(b) 6
15 U.S.C. § 77z-1(b)(1) 27
15 U.S.C. § 77z-1(c) 6, 27
15 U.S.C. § 77z-2(a) 6
15 U.S.C. § 77z-2(b)(2)(D) 6
15 U.S.C. § 77z-2(c) 6
15 U.S.C. § 77aa 2

Securities Exchange Act of 1934,
15 U.S.C. § 78a *et seq.* 4
15 U.S.C. § 78aa(a) 29, 33, 43
15 U.S.C. § 78bb(f)(1) 29, 43

Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353,
112 Stat. 3227 7
§ 1, 112 Stat. 3227 24
§ 2, 112 Stat. 3227 20
§ 2(1), 112 Stat. 3227 20

TABLE OF AUTHORITIES—Continued

Page

§ 2(2), 112 Stat. 3227 ..... 7, 20, 21

§ 2(3), 112 Stat. 3227 ..... 20, 21

§ 2(5), 112 Stat. 3227 ..... 20, 24, 25, 30, 37

§ 101(a)(3), 112 Stat. 3230 34

§ 101(a)(3)(A), 112 Stat. 3230 ..... 8, 10, 14

§ 101(a)(3)(B), 112 Stat. 3230 8

tit. III, § 301, 112 Stat. 3235 35

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1441(a) 19

RULE:

Fed. R. Civ. P. 11 6

LEGISLATIVE MATERIALS:

H.R. Conf. Rep. No. 104-369 (1995) 4, 5, 26, 27

H.R. Conf. Rep. No. 105-803 (1998) ..... *passim*

H.R. Rep. No. 105-640 (1998) 20, 21, 28

S. Rep. No. 105-182 (1998) ..... *passim*

Securities Litigation Abuses: Hearing on the Effectiveness of the Private Securities Litigation Reform Act of 1995 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs, 105th Cong. (July 24, 1997) 22

The Securities Litigation Uniform Standards Act of 1997: Hearing on H.R. 1689 Before the Subcomm. on Fin. & Hazardous Materials of the H. Comm. on Commerce, 105th Cong. (May 19, 1998) 23, 24, 29, 30

TABLE OF AUTHORITIES—Continued

Page

The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. of Banking, Hous. & Urban Affairs, 105th Cong. (Oct. 29, 1997) 23

143 Cong. Rec.:

S10,475 (daily ed. Oct. 7, 1997) 28

S10,477 (daily ed. Oct. 7, 1997) 30

144 Cong. Rec.:

E1424 (daily ed. July 24, 1998) 22

H6057 (daily ed. July 21, 1998) 21, 22

H6060 (daily ed. July 21, 1998) 28

H6062 (daily ed. July 21, 1998) 23

H10,771 (daily ed. Oct. 13, 1998) 28

H10,776 (daily ed. Oct. 13, 1998) 22

H10,779 (daily ed. Oct. 13, 1998) 25

S4780 (daily ed. May 13, 1998) 28

S4790 (daily ed. May 13, 1998) 25

S4808 (daily ed. May 13, 1998) 28

EXECUTIVE MATERIALS:

President William J. Clinton, Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247 (Nov. 3, 1998) 23, 24

TABLE OF AUTHORITIES—Continued

Page

Letter from SEC Chairman Arthur Levitt et al. to Sen. Alfonse M. D'Amato et al. (Mar. 24, 1998) 23

OTHER AUTHORITIES:

Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction To Hear Securities Act Class Actions, but the Frequent Failure To Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. Pa. J. Bus. L. 739 (2015) 16

Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273 (1998) 24

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 20

IN THE

Supreme Court of the United States

No. 15-1439

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the California Supreme Court denying the petition for review is unreported. Pet. App. 16a. The order of the California Court of Appeal denying the petition for a writ of mandate, prohibition, or other relief is unreported. *Id.* at 15a. The order of the California Superior Court denying the motion for judgment on the pleadings is unreported. *Id.* at 1a-2a.

JURISDICTION

The California Court of Appeal entered judgment on December 10, 2015, Pet. App. 15a, and the California Supreme Court denied discretionary review on February 24, 2016, *id.* at 16a. The petition for a writ

of certiorari was filed on May 24, 2016, and was granted on June 27, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). *See* Cyan Cert. Supp. Br. 3-6.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an addendum to this brief. Add. 1a-25a.

STATEMENT

A. Statutory Background

1. Following the stock market crash of 1929, Congress enacted "a series of laws" directed at the securities industry. *Kokesh* v. *SEC*, 137 S. Ct. 1635, 1639-1640 (2017). The first of those laws was the Securities Act of 1933 (1933 Act), ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a *et seq.*). The 1933 Act is "primarly concerned" with "new offerings" of securities. *United States* v. *Naftalin*, 441 U.S. 768, 777-778 (1979). It imposes certain registration and disclosure obligations on issuers, the companies making such offerings. *See* 15 U.S.C. § 77b(a)(4); *Omnicare* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015). As a general matter, issuers must file registration statements with the Securities and Exchange Commission (SEC), containing information about themselves and their securities. *See* 15 U.S.C. §§ 77e(a), 77e(c), 77g, 77aa. Any prospectus offering new securities to the public must include such information, too. *See id.* §§ 77e(b), 77j; *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

The 1933 Act provides express causes of action to enforce these obligations. A person acquiring a security may hold the issuer (and others) liable if a

registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). A purchaser may similarly sue if a prospectus included a material misstatement or omission, *id.* § 77*l*(a)(2), or if a person offers or sells a security without any valid registration statement or prospectus, *id.* §§ 77e, 77*l*(a)(1).

Section 22(a) of the 1933 Act governs where such claims may be heard. *Id.* § 77v(a). Its first sentence is a *jurisdictional* provision. As originally enacted, it provided:

> The district courts of the United States * * * shall have jurisdiction of offenses and violations under [the 1933 Act] and under the rules and regulations promulgated by the Commission in respect thereto, and, *concurrent with State and Territorial courts*, of all suits in equity and actions at law brought to enforce any liability or duty created by [the 1933 Act].

Ch. 38, § 22(a), 48 Stat. at 86 (emphasis added) (codified at 15 U.S.C. § 77v(a)). Thus, under the original 1933 Act, plaintiffs could choose to bring their 1933 Act claims in either federal or state court.

The penultimate sentence of Section 22(a) is an *anti-removal* provision. In the original 1933 Act, it stated: "No case arising under [the 1933 Act] and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.* § 22(a), 48 Stat. at 87 (codified at 15 U.S.C. § 77v(a)). The effect of this provision was to preserve the plaintiff's choice of forum; a plaintiff who chose to pursue a 1933 Act claim in state court could do so

even if the defendant preferred to litigate in federal court.

2. In 1995, bipartisan supermajorities of both houses of Congress passed the Private Securities Litigation Reform Act (Reform Act), Pub. L. No. 104-67, 109 Stat. 737, over the President's veto. The Reform Act was prompted by fears that the "private securities litigation system" was being "undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Conf. Rep. No. 104-369, at 31 (1995). Of particular concern were "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent'"—abuses that "had become rampant" in the years leading up to the Reform Act. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31). "Proponents of the Reform Act argued that these abuses resulted in extortionate settlements, chilled any discussion of issuers' future prospects, and deterred qualified individuals from serving on boards of directors," *id.*, ultimately harming the very people the securities laws were meant to protect: investors. *See* H.R. Conf. Rep. No. 104-369, at 31-32.

To curb these abuses, the Reform Act amended the 1933 Act by establishing a number of protections that apply to 1933 Act claims. (It also amended the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. § 78a *et seq.*, in similar ways.) Most of the protections added to the 1933 Act are specific to 1933 Act claims brought as class actions pursuant to the Federal Rules of Civil Procedure, which Congress

regarded as the greatest source of abuse. *See id.* § 77z-1(a); *Dabit*, 547 U.S. at 81. For instance:

- To "discourage the use of professional plaintiffs" as class representatives, H.R. Conf. Rep. No. 104-369, at 33, the Reform Act requires that each lead plaintiff file a sworn certification stating, among other things, that "the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel," 15 U.S.C. § 77z-1(a)(2)(A)(ii). The Reform Act also forbids the payment of bounties to class representatives, requiring that their share of any final judgment be calculated instead on the same per-share basis as that of other class members. *Id.* § 77z-1(a)(4).
- To ensure that the class is represented by those "most capable" of doing so, the Reform Act establishes a process for determining the "most adequate plaintiff." *Id.* § 77z-1(a)(3). That process allows any class member to move to serve as lead plaintiff, and requires the court to presume that the "most adequate plaintiff" is whoever has "the largest financial interest in the relief sought by the class." *Id.* § 77z-1(a)(3)(A)(i), (B)(iii)(I).
- And to prevent lawyer-driven class settlements, the Reform Act restricts any award of attorneys' fees and expenses to a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *Id.* § 77z-1(a)(6). The Reform Act also generally prohibits the filing of settlement agreements under seal and requires the disclosure of meaningful information to class members when the parties

have reached a proposed settlement. *Id.* § 77z-1(a)(5), (7).

In addition to these class-action-specific reforms, the Reform Act established several protections that apply to *all* 1933 Act claims, whether brought as class actions or not. For example, the Reform Act provides, with limited exceptions, for an automatic stay of discovery pending resolution of any motion to dismiss. *Id.* § 77z-1(b). It requires the court to make "specific findings" regarding whether any party or attorney should be subject to sanctions for abusive litigation under Federal Rule of Civil Procedure 11. *Id.* § 77z-1(c). It creates a safe harbor from 1933 Act liability for forward-looking statements made in particular circumstances. *Id.* § 77z-2(a), (c); *see also id.* § 77z-2(b)(2)(D) (excluding from the safe harbor any forward-looking statement "made in connection with an initial public offering"). And it excepts outside directors from joint and several liability for certain 1933 Act violations. *Id.* § 77k(f).

In the years following its enactment, however, the Reform Act had "an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether." *Dabit*, 547 U.S. at 82. That is because the Reform Act's protections do not apply at all to state-law claims. And even as to 1933 Act claims, most of the Reform Act's protections apply only in federal court; indeed, none of the class-action-specific reforms applies in state court. *See, e.g.*, 15 U.S.C. § 77z-1(a)(1) (limiting the application of the class-action-specific reforms to "private action[s] arising under this subchapter" that are "brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure").

3. In 1998, Congress enacted the Securities Litigation Uniform Standards Act (SLUSA) to stem this "shift[] from Federal to State courts." Pub. L. No. 105-353, § 2(2), 112 Stat. 3227, 3227. SLUSA did so in two ways.

First, SLUSA amended Section 16 of the 1933 Act to include a new *preclusion* provision in Section 16(b), prohibiting plaintiffs from refashioning certain 1933 Act claims as claims under state law. Section 16(b) states that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging" either "(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security" or "(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b); *see also id.* § 77p(d) (excepting certain actions, such as actions based on the law of the State in which the issuer is incorporated, from the scope of preclusion). And just in case state courts are not faithful to this preclusion provision, Section 16(c), which SLUSA also added, provides for the removal of "[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)"—thus allowing the preclusion determination to be made by a federal court. *Id.* § 77p(c); *see Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 642-643 (2006).

Second, SLUSA amended the *jurisdictional* and *anti-removal* provisions of Section 22(a) to ensure that certain 1933 Act claims would be litigated only in federal court. SLUSA did so by inserting an exception into each provision. Thus, the jurisdic-

tional provision now states that "district courts * * * shall have jurisdiction * * *, concurrent with State and Territorial courts, *except as provided in section [16] with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter"—this "subchapter" being the 1933 Act. 15 U.S.C. § 77v(a) (emphasis added); *see id.* § 77a; Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230. And the anti-removal provision now states: "*Except as provided in section [16(c)]*, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 15 U.S.C. § 77v(a) (emphasis added); *see* Pub. L. No. 105-353, § 101(a)(3)(B), 112 Stat. at 3230.

Finally, SLUSA provides definitions for "covered class action" and "covered security" in Section 16. A "covered class action" means, among other things, a "single lawsuit in which * * * damages are sought on behalf of more than 50 persons or prospective class members" and in which questions of law or fact common to the class "predominate" over individualized issues (leaving aside "issues of individualized reliance"). 15 U.S.C. § 77p(f)(2)(A)(i)(I); *see also id.* § 77p(f)(2)(A)(i)(II), (ii) (describing other actions that qualify as "covered class action[s]"). And a "covered security" means a security listed on a national exchange (such as the New York Stock Exchange) or issued by a registered investment company. *Id.* §§ 77p(f)(3), 77r(b)(1)-(2).

B. Respondents' Suit

Cyan, Inc., was a company that supplied hardware and software for communications networks. J.A. 18. In May 2013, Cyan conducted its initial public offer-

ing (IPO), J.A. 13, and its stock began trading on the New York Stock Exchange. Pet. 9; *see also Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 268 (2007) ("An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public.").

In 2014, following a drop in stock price, J.A. 27-28, respondents sued Cyan and its officers and directors (collectively, Cyan) in California Superior Court, seeking damages on behalf of a putative class of purchasers of Cyan's stock, J.A. 15, 28, 33. The complaint claimed that the registration statement and prospectus issued in connection with Cyan's IPO contained material misstatements and omissions, in violation of the 1933 Act. J.A. 30-33. The complaint did not assert any claims under state law. *Id.*

The Superior Court overruled Cyan's demurrer to the complaint, J.A. 5, and certified a class, J.A. 8. Cyan then moved for judgment on the pleadings for lack of subject-matter jurisdiction. J.A. 8-9. Cyan argued that SLUSA's amendment to Section 22(a)'s jurisdictional provision divested state courts of concurrent jurisdiction over "covered class actions" alleging only 1933 Act claims. *See* Cyan Mem. of P. & A. in Supp. of Mot. for J. on the Pleadings 5-8.

Respondents did not dispute that they had brought a "covered class action" as defined in Section 16 of the 1933 Act. *See* Pls.' Opp. to Mot. for J. on the Pleadings 1 n.2; Br. in Opp. 3. The Superior Court nevertheless denied Cyan's motion, explaining that its "hands [we]re tied" by the California Court of Appeal's decision in *Luther* v. *Countrywide Financial Corp.*, 125 Cal. Rptr. 3d 716 (Ct. App. 2011). Pet. App. 1a, 5a-6a. According to *Countrywide*, "concur-

rent jurisdiction" over a "covered class action" arising under the 1933 Act "survived the amendments to the 1933 Act" made by SLUSA. 125 Cal. Rptr. 3d at 721.

Cyan filed a petition for a writ of mandate, prohibition, or other relief in the California Court of Appeal, challenging the Superior Court's jurisdiction under SLUSA. Pet. App. 32a. The Court of Appeal denied the petition without opinion, *id.* at 15a, and the California Supreme Court denied discretionary review, *id.* at 16a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

SLUSA amended the 1933 Act's jurisdictional provision. That provision formerly granted state courts concurrent jurisdiction to decide claims under the 1933 Act, without exception. But as amended by SLUSA, state courts now enjoy such jurisdiction, "except as provided in section 16 with respect to covered class actions." Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230 (codified at 15 U.S.C. § 77v(a)).

I. The plain text of the "except" clause divests state courts of concurrent jurisdiction over 1933 Act claims in covered class actions. The word "except" announces an "except[ion]" to state-court jurisdiction. The words "as provided in section 16" point the reader to Section 16, which "provide[s]" a definition of a "covered class action." And the words "covered class actions" specify what actions the exception covers. The text is thus naturally read to except 1933 Act claims in covered class actions, as defined in Section 16, from the concurrent jurisdiction of state courts.

The structure of the 1933 Act, as amended by SLUSA, reinforces that reading. The addition of the "except" clause was part of a package of amendments that included two other changes—the addition of a preclusion provision and the amendment of the anti-removal provision. The first addressed covered class actions involving only *state-law* claims of particular federal concern, and the second addressed covered class actions involving a *mix* of such state-law claims and 1933 Act claims. The point of both amendments was to prevent those types of covered class actions from being used to evade the Reform Act's protections against class-action abuse. The addition of the "except" clause should be understood as doing the same for the only category of covered class actions of federal concern remaining—covered class actions involving only *1933 Act* claims—by excepting those actions from the concurrent jurisdiction of state courts. Construing the "except" clause in that way honors the "symmetrical and coherent regulatory scheme" that Congress presumably intended. *Gustafson*, 513 U.S. at 569.

That construction also accords with SLUSA's history and purposes. Excepting 1933 Act claims in covered class actions from state-court jurisdiction advances all three of Congress's goals in enacting SLUSA. First, it serves the overall objectives of the Reform Act, by ensuring that such claims are heard in federal court, where all of the Reform Act's protections apply. Second, it stems the tide of securities class actions being filed in state rather than federal court, by making federal court the exclusive venue for almost all such actions. And third, it helps achieve "Uniform Standards," as referenced in the statute's title, for the type of "Securities Litigation"

that Congress cared about most—covered class actions involving nationally traded securities—by preventing such actions from being heard in state court, where they would be subject to disparate procedural rules.

Finally, administrative simplicity is a virtue in jurisdictional rules. And requiring 1933 Act claims in covered class actions to be heard in federal court would be a straightforward rule to administer. Indeed, there is often no dispute over whether a suit is a covered class action, just as there is no dispute in this case: Everyone agrees that respondents' suit is a covered class action alleging only 1933 Act claims.

In short, all of the traditional tools of statutory construction lead to the same conclusion: SLUSA withdrew 1933 Act claims in covered class actions from the concurrent jurisdiction of state courts. The California Superior Court thus lacks jurisdiction over respondents' suit in this case.

II. Respondents' and the United States' competing interpretations of the "except" clause should be rejected.

A. According to respondents, the "except" clause does not except *any* 1933 Act claims from state-court jurisdiction. Instead, respondents argue, the clause reflects the fact that certain state-law class actions are *precluded* under SLUSA. But preclusion and jurisdiction are entirely different concepts. When an action is precluded, it must be dismissed for failure to state a claim, not for lack of jurisdiction. So an "except" clause about preclusion, which creates no "except[ion]" to jurisdiction at all, cannot be squared with the text or common sense.

There are other problems with respondents' reading. If adopted, it would mean that in plugging the Reform Act's loopholes, Congress simply failed to address covered class actions involving only 1933 Act claims—leaving that gaping loophole wide open. It would also defy Congress's intent in other ways, by causing 1933 Act claims in covered class actions to be stuck in state court instead of shifting them back to federal court, and by exposing such claims to the procedural standards of 50 States instead of placing them under uniform national standards.

B. The United States similarly resists reading the "except" clause to except *any* 1933 Act claims from state-court jurisdiction. But unlike respondents, the United States argues that SLUSA should be construed to allow 1933 Act covered class actions analogous to the state-law covered class actions precluded by SLUSA to be removed to federal court. That reading of SLUSA is certainly more faithful to the statutory scheme than respondents' reading. After all, it would allow at least some 1933 Act covered class actions filed in state court to make their way into a federal forum, where they would be subject to all of the Reform Act's protections.

But the United States' position still fails to give any meaningful effect to the "except" clause. Its principal submission is that Congress added the "except" clause to make clear that in class actions involving a mix of 1933 Act claims and state-law claims precluded by SLUSA, state courts lack jurisdiction over the state-law claims. But again, preclusion and jurisdiction are two different things. And even if preclusion implied a lack of jurisdiction, the United States' reading would still make no sense, because *federal* courts would lack jurisdiction over

the state-law claims, too. That Congress wrote an "except" clause that applies only to the jurisdiction of *state* courts is reason enough to reject the United States' reading.

The judgment of the California Court of Appeal should be reversed.

ARGUMENT

Prior to SLUSA, the first sentence of Section 22(a) of the 1933 Act gave state courts concurrent jurisdiction over claims arising under the 1933 Act. SLUSA amended that jurisdictional provision by inserting twelve new words: "except as provided in section 16 with respect to covered class actions." Pub. L. No. 105-353, § 101(a)(3)(A), 112 Stat. at 3230 (codified at 15 U.S.C. § 77v(a)).

The question in this case is what that clause means. All of the traditional tools of statutory construction point to the same answer: The "except" clause divests state courts of jurisdiction over 1933 Act claims in "covered class actions," a term defined in Section 16. The California Superior Court thus lacks jurisdiction over respondents' covered class action in this case, which alleges only 1933 Act claims.

I. SLUSA DIVESTED STATE COURTS OF CONCURRENT JURISDICTION OVER 1933 ACT CLAIMS IN COVERED CLASS ACTIONS

1. "Start, as [this Court] always do[es], with the statutory language." *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1658 (2017). As amended by SLUSA, the text of the first sentence of Section 22(a) provides:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, *except as provided in section [16] with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

15 U.S.C. § 77v(a) (emphasis added).

Before SLUSA added the italicized twelve words, "[t]he district courts of the United States" had "jurisdiction * * *, concurrent with State * * * courts, * * * of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter." *Id.* "[T]his subchapter" refers to the 1933 Act. *See id.* § 77a ("This subchapter may be cited as the 'Securities Act of 1933.'"). So, pre-SLUSA, Section 22(a) granted state courts concurrent jurisdiction over all 1933 Act claims.

SLUSA changed that. "When Congress acts to amend a statute," it presumably "intends its amendment to have real and substantial effect." *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1401 (2014) (internal quotation marks omitted). In SLUSA, Congress amended the 1933 Act by creating an express "except[ion]" to Section 22(a)'s grant of concurrent jurisdiction. 15 U.S.C. § 77v(a). That amendment must be read to "except" *some* category of 1933 Act claims from the "concurrent" "jurisdiction" of "State" courts.

The text of the amendment tells us precisely what that category is: 1933 Act claims in "covered class actions," "as provided in section [16]." *Id.* Section 16 provides a definition of a "covered class action." *Id.* § 77p(f)(2). And the words "as provided in section [16]" serve to cross-reference that definition. Without those words, the term "covered class actions" in Section 22(a) would be undefined. That is because Section 22(a) lacks any definitions of its own, and because the definitions found in Section 16 are otherwise applicable only to the provisions of Section 16 itself. *See id.* § 77p(f) ("For purposes of *this section*, the following definitions shall apply * * *." (emphasis added)). The words "as provided in section [16]" are thus necessary to give content to Section 22(a)'s reference to "covered class actions." *See* Mitchell A. Lowenthal & Shiwon Choe, *State Courts Lack Jurisdiction To Hear Securities Act Class Actions, but the Frequent Failure To Ask the Right Question Too Often Produces the Wrong Answer*, 17 U. Pa. J. Bus. L. 739, 755 (2015). The meaning of the text is plain: State courts lack jurisdiction over 1933 Act claims in "covered class actions," as defined in Section 16.

2. The structure of the 1933 Act, as amended by SLUSA, reinforces that interpretation. "The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions." *Gustafson*, 513 U.S. at 570. Rather, it should "be interpreted as a symmetrical and coherent regulatory scheme." *Id.* at 569. Accordingly, SLUSA's addition of an "except" clause to Section 22(a)'s jurisdictional provision should be understood in light of SLUSA's other amendments—namely, its addition of a preclu-

sion provision to Section 16 and its amendment of the anti-removal provision in Section 22(a).

Consider first SLUSA's addition of a preclusion provision to Section 16. That provision, Section 16(b), addresses covered class actions of a specific type: covered class actions based on *state* law that are of particular federal concern because they allege untruth or deception in connection with covered securities (which, generally speaking, are traded on national exchanges). *See* 15 U.S.C. §§ 77p(b), 77p(f)(3), 77r(b)(1). The preclusion provision provides that such state-law actions may not be "maintained" at all; whether brought in state or federal court, they must be dismissed. *Id.* § 77p(b); *see Kircher*, 547 U.S. at 636 n.1. If they are brought in state court and the state court fails to dismiss them, they may be removed under Section 16(c) to federal court and must be dismissed there. 15 U.S.C. § 77p(c). The bottom line is this: The preclusion provision addresses *state-law* covered class actions, and says that if they involve claims of particular federal concern, they cannot be maintained in any court, including state court.

Next consider SLUSA's amendment to the anti-removal provision in Section 22(a). As amended, that provision addresses *mixed* covered class actions—covered class actions involving a mix of 1933 Act *and* state-law claims. *See id.* § 77v(a). That much is clear from the text of the amended provision itself, which states: "Except *as provided in section [16(c)]*, no case *arising under this subchapter* and brought in any State court of competent jurisdiction shall be removed to any court of the United States." *Id.* (emphases added). The text thus contemplates a covered class action that not only "aris[es] under this

subchapter" but also falls within the scope of "section [16(c)]"—which is to say, that involves *both* 1933 Act *and* state-law claims. And by allowing for the removal of such an action to federal court—where the state-law claims would be dismissed and the 1933 Act claims adjudicated—the amended provision offers the 1933 Act claims a way out of state court.

That leaves SLUSA's addition of the "except" clause to Section 22(a)'s jurisdictional provision. That amendment should be understood as forming part of the same "symmetrical and coherent regulatory scheme" as the amendments just discussed. *Gustafson*, 513 U.S. at 569. If the preclusion provision addresses *state-law* covered class actions, and if the amendment to the anti-removal provision addresses *mixed* covered class actions, then the "except" clause in the jurisdictional provision should naturally be understood to address the only category of covered class actions of federal concern remaining: *1933 Act* covered class actions. That is, the clause should be construed as excepting 1933 Act claims in covered class actions from the jurisdiction of state courts.

A different construction would leave a gaping hole in the regulatory scheme. Just imagine if Congress had added the preclusion provision and amended the anti-removal provision, but then stopped there, leaving the jurisdictional provision untouched. State-law covered class actions of particular federal concern would be subject to dismissal or removal from state court, and 1933 Act claims in mixed covered class actions would be removable as well. But 1933 Act claims brought on their own in a covered class action would be stuck in state court. They could not even be removed. That is because, absent an amendment to the jurisdictional provision, they

would be "case[s] arising under this subchapter and brought in [a] State court of competent jurisdiction," their path to federal court blocked by the anti-removal provision. 15 U.S.C. § 77v(a). Plaintiffs could thus guarantee their choice of a state forum—where most of the Reform Act's protections do not apply—simply by bringing covered class actions alleging *only* 1933 Act claims.

That cannot be the regulatory scheme that Congress intended. If Congress intended a 1933 Act claim brought *alongside* a state-law claim to be removable to federal court—where it would be subject to all of the Reform Act's protections—then surely it intended a 1933 Act claim brought *by itself* to be litigated in federal court as well. Construing the "except" clause to apply to covered class actions alleging only 1933 Act claims ensures that such actions, when brought in state court, will be either dismissed for lack of jurisdiction or removed to a federal forum. *See* 28 U.S.C. § 1441(a) (providing generally for the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction"). Section 22(a)'s anti-removal provision would not stand in the way of the latter, because that provision bars removal only when the state court is a court of "competent jurisdiction"—which the state court would not be because of the "except" clause. 15 U.S.C. § 77v(a); *see, e.g.*, *Hung* v. *iDreamSky Tech. Ltd.*, No. 15-cv-2514, 2016 WL 299034, at *2 (S.D.N.Y. Jan. 25, 2016); *Knox* v. *Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009). The structure of the statute thus confirms what the text alone establishes: The "except" clause should be read to divest state courts of

jurisdiction over 1933 Act claims in covered class actions.

3. That interpretation also squares with the history and purposes behind SLUSA. Congress enacted findings as part of SLUSA and included them in the statutory text as a preamble. *See* Pub. L. No. 105-353, § 2, 112 Stat. at 3227; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217 (2012) ("A preamble, purpose clause, or recital is a permissible indicator of meaning."). Those findings make clear that in enacting SLUSA, Congress sought to accomplish three interrelated goals. First, Congress sought to set the Reform Act on a course toward "fully achieving its objectives." *See* Pub. L. No. 105-353, § 2(1), (3), (5), 112 Stat. at 3227. Second, Congress sought to stem the "shift[] from Federal to State courts" of filings of "securities class action lawsuits." *Id.* § 2(2), 112 Stat. at 3227. And third, Congress sought to "enact national standards for securities class action lawsuits involving nationally traded securities." *Id.* § 2(5), 112 Stat. at 3227. Construing the "except" clause as divesting state courts of jurisdiction over 1933 Act claims in covered class actions advances each of those goals.

First, Congress enacted SLUSA to make good on the promise of the Reform Act. *Id.* § 2(1), (3), (5), 112 Stat. at 3227. Congress had passed the Reform Act in 1995 with the hopes of "put[ting] an end to vexatious litigation that was draining value from the shareholders and employees of public companies." H.R. Rep. No. 105-640, at 9 (1998). But Congress soon found that "plaintiffs' lawyers [were] circumvent[ing] the Act's provisions by * * * filing frivolous and speculative lawsuits in State court, where essentially none of the Reform Act's procedural or

substantive protections against abusive suits are available." H.R. Conf. Rep. No. 105-803, at 14-15 (1998). So Congress enacted SLUSA to finish the job the Reform Act had started—or, as a primary sponsor of SLUSA put it, to "perfect what [Congress] did in 1995, to make it work right." 144 Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. Rick White); *see also* H.R. Rep. No. 105-640, at 8-9 ("The purpose of [SLUSA] is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.").

Eliminating state-court jurisdiction over 1933 Act claims in covered class actions does just that. Most of the Reform Act's protections—including all of its class-action-specific reforms—apply only to 1933 Act claims brought in federal court. *See supra* p. 6. By excepting 1933 Act claims in covered class actions from state-court jurisdiction, the "except" clause makes federal court the only place where such claims may be heard—closing the Reform Act's "loophole," S. Rep. No. 105-182, at 9 (1998), and bringing that Act closer to "fully achieving" its promised reforms, Pub. L. No. 105-353, § 2(3), 112 Stat. at 3227.

Second, and relatedly, Congress wanted to stem the tide of securities class actions being filed in state, rather than federal, court. *See id.* § 2(2), 112 Stat. at 3227; *Dabit*, 547 U.S. at 82; S. Rep. No. 105-182, at 3. What concerned Congress was not just the growing number of state-court filings alleging violations of *state* law, but also the growing number of state-court filings alleging violations of *federal* law. *See* S. Rep. No. 105-182, at 3 (quoting testimony that plaintiffs had sought "to establish alternative state court venues for settlement of federal claims"); 144

Cong. Rec. H6057 (daily ed. July 21, 1998) (statement of Rep. White) ("One thing we discovered is that suits that were formerly brought in Federal court under the old days were now being brought in State court as a way of getting around the statute that we passed."); *Securities Litigation Abuses: Hearing on the Effectiveness of the Private Securities Litigation Reform Act of 1995 Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous. & Urban Affairs*, 105th Cong. 22 (July 24, 1997) (statement of Richard I. Miller, Gen. Counsel & Sec'y, Am. Inst. of Certified Pub. Accountants) (observing that "the ability of plaintiffs to take Federal securities class action cases, cases that are traditionally * * * filed in Federal court, to State courts, is a major loophole" of the Reform Act).

So in enacting SLUSA, Congress set out to "make[] Federal court the *exclusive* venue for most securities class action lawsuits"—including those under the 1933 Act. H.R. Conf. Rep. No. 105-803, at 13 (emphasis added). Members of Congress described SLUSA in those terms. *See, e.g.*, 144 Cong. Rec. E1424 (daily ed. July 24, 1998) (statement of Rep. Jane Harman, cosponsor) ("The measure before us * * * would generally proscribe bringing a private class action suit involving 50 or more parties except in Federal court."); *id.* at H10,776 (daily ed. Oct. 13, 1998) (statement of Rep. John Dingell) ("By making Federal courts the *exclusive* venue for most of the securities class action lawsuits, [SLUSA] imposes the standards of the [Reform Act] on all securities class actions lawsuits, except those narrow instances specifically excluded by [SLUSA]." (emphasis added)); *The Securities Litigation Uniform Standards Act of 1997: Hearing on H.R. 1689 Before the Sub-*

comm. on Fin. & Hazardous Materials of the H. Comm. on Commerce, 105th Cong. 1 (May 19, 1998) [hereinafter *House Hearing*] (statement of Rep. Tom Bliley, Comm. Chairman) ("This legislation makes Federal court the *exclusive* venue for securities class actions." (emphasis added)).

And when the President signed SLUSA into law, he likewise recognized that, under the new legislation, "class actions generally c[ould] be brought *only* in Federal court, where they w[ould] be governed by Federal law." President William J. Clinton, Statement on Signing the Securities Litigation Uniform Standards Act of 1998, 34 Weekly Comp. Pres. Doc. 2247, 2248 (Nov. 3, 1998) (emphasis added). The SEC shared the same view. *See* Letter from SEC Chairman Arthur Levitt et al. to Sen. Alfonse M. D'Amato et al. (Mar. 24, 1998) ("[T]he bill generally provides that class actions can be brought *only* in federal court where they will be governed by federal law." (emphasis added)), *reprinted in* 144 Cong. Rec. H6062 (daily ed. July 21, 1998).

Indeed, even witnesses who testified against the legislation acknowledged that it would require that 1933 Act class actions be heard in federal court. *See The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Sec. of the S. Comm. of Banking, Hous. & Urban Affairs*, 105th Cong. 24 (Oct. 29, 1997) (statement of Herbert E. Milstein, Nat'l Ass'n of Sec. & Commercial Law Att'ys) ("[SLUSA] will preclude States from hearing actions under the 1933 Act, which they have had since that Act was passed."); *House Hearing*, *supra*, at 73 (statement of Richard W. Painter, Prof., Cornell Univ. Law Sch.) ("Investors should not now be told that their only remedy for fraud is in Federal

court and under Federal law."); *id.* at 116 (statement of Mary Rouleau, Legislative Dir., Consumer Fed'n of Am.) (calling SLUSA "overly broad" partly because "it would prevent state courts from trying claims based on federal law violations"). As one leading commentator summed it up, SLUSA would "eliminate concurrent state jurisdiction over 1933 Act claims in favor of exclusive jurisdiction in the federal courts." Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 335 (1998).

None of these statements would make much sense unless the "except" clause divested state courts of jurisdiction over 1933 Act claims in covered class actions. Only by withdrawing such jurisdiction from state courts would "Federal court" become "the *exclusive* venue for most securities class action lawsuits," H.R. Conf. Rep. No. 105-803, at 13 (emphasis added), and the "*only*" place where "class actions generally can be brought," 34 Weekly Comp. Pres. Doc. at 2248 (emphasis added). The "except" clause should thus be understood to accomplish precisely what members of Congress, the President, the SEC, and others all expected SLUSA to do: shift 1933 Act claims in covered class actions back into federal court.

Third, as the name of the statute suggests, Congress wanted to create "Uniform Standards" for "Securities Litigation." Pub. L. No. 105-353, § 1, 112 Stat. at 3227. Foremost on Congress's mind were "securities class action lawsuits involving nationally traded securities," *id.* § 2(5), 112 Stat. at 3227—known as "covered securit[ies]" under the statute, 15 U.S.C. §§ 77p(f)(3), 77r(b)(1). The federal interest is greatest in suits, like this one, involving such securi-

ties. *See Dabit*, 547 U.S. at 78 ("The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated."). So Congress wanted to make sure that those suits, in particular, were governed by "national standards." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227.

To accomplish that goal, Congress understood that preclusion of state-law class actions would be necessary but not sufficient. It would be necessary because, without preclusion, issuers and other defendants could face class actions not just under the 1933 Act but also the laws of the fifty States. Accordingly, Congress enacted a preclusion provision in Section 16(b) to ensure that most class actions involving covered securities proceed under the same *substantive* standards of the 1933 Act. 15 U.S.C. § 77p(b).

But Congress understood that preclusion would not be sufficient, because genuine uniformity is about more than just substance; it is about procedure, too. "Disparate, and shifting, state litigation *procedures*" also "foster fragmentation of our national system of securities litigation." S. Rep. No. 105-182, at 3 (emphasis added) (quoting the hearing testimony of Stephen M.H. Wallman, Comm'r, SEC); *see also* 144 Cong. Rec. S4790 (daily ed. May 13, 1998) (statement of Sen. Christopher Dodd, cosponsor and manager) (discussing the need to address "'[d]isparate, and shifting, state litigation procedures'"); *id.* at H10,779 (daily ed. Oct. 13, 1998) (statement of Rep. Mike Oxley, manager) ("[SLUSA] creates a national standard under which securities class actions must be filed and that standard is the one that Congress resoundingly approved back in 1995."). Thus, so long as plaintiffs could bring their 1933 Act class actions

in *either* state *or* federal court, class actions involving nationally traded securities would not be governed by national standards at all.

Take, for example, the rules governing the conduct of class-action plaintiffs. Under the Reform Act, "[e]ach plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification" stating, among other things, that "the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel," and that "the plaintiff will not accept any payment for serving as a representative party * * * beyond the plaintiff's pro rata share of any recovery." 15 U.S.C. § 77z-1(a)(2)(A)(ii), (vi). Congress enacted these requirements to address "abuses involving the use of 'professional plaintiffs,'" who pursue meritless class actions in the hopes of receiving "the payment of a bounty or bonus" for doing so. H.R. Conf. Rep. No. 104-369, at 32-33. But these reforms apply only in federal court; they do not apply in state court. *See* 15 U.S.C. § 77z-1(a)(1). Thus, prior to SLUSA, some defendants enjoyed the benefit of these protections, while others did not, depending on where the plaintiffs had chosen to sue. *See* S. Rep. No. 105-182, at 3 (documenting a "substitution effect" whereby some plaintiffs file in state rather than federal court (internal quotation marks omitted)). The same defendant could even face "parallel" litigation in both state and federal court, each forum applying a different set of rules governing the conduct of class-action plaintiffs. *Id.* (internal quotation marks omitted); *see also* H.R. Conf. Rep. No. 105-803, at 14 (documenting the same phenomenon).

And that is just one example. As outlined above, the Reform Act contains a host of other protections

aimed at ensuring the most capable class representatives, preventing lawyer-driven class settlements, and strengthening the application of Rule 11 sanctions. *See supra* pp. 4-6. By the terms of the statute, none of those protections applies in state court. *See* 15 U.S.C. § 77z-1(a)(1), (c). In addition, some state courts in 1933 Act suits have refused to stay discovery pending a motion to dismiss, on the view that the Reform Act's automatic-stay provision does not apply in state court either. *See id.* § 77z-1(b)(1); Order Den. Mot. To Stay Proceedings 3, *Buelow* v. *Alibaba Grp. Holding Ltd.*, No. CIV 535692 (Cal. Super. Ct. Apr. 1, 2016); Order Den. Defs.' Mot. To Stay Proceedings 9-10, *In re Pac. Biosciences of Cal. Inc. Sec. Litig.*, No. CIV 509210 (Cal. Super. Ct. May 24, 2012). If that view were correct, plaintiffs under the pre-SLUSA scheme would have been free to do in state court what they may not do in federal court: impose on "innocent parties" the heavy "cost of discovery," "forc[ing] [them] to settle frivolous securities class actions." H.R. Conf. Rep. No. 104-369, at 37. All of this is to say that as long as state courts remained open to hear 1933 Act class actions, defendants would have been subject to "[d]isparate, and shifting, state litigation procedures," undermining the possibility of uniformity in the resolution of class actions involving nationally traded securities. S. Rep. No. 105-182, at 3 (internal quotation marks omitted).

To achieve uniformity, then, Congress had to ensure that covered class actions involving nationally traded securities were not only governed by federal law, but also heard in federal court. In the words of Senator Alfonse D'Amato, then-chairman of the Senate Banking Committee: "There should be a

uniform standard, and there should be a uniform procedure. And that is why we moved these nationally traded securities *** to a Federal forum." 144 Cong. Rec. S4780, S4808 (daily ed. May 13, 1998). Or as the conference committee's report put it, "class actions relating to a 'covered security' *** alleging fraud or manipulation must be maintained pursuant to the provisions of Federal securities law, in Federal court (subject to certain exceptions)." H.R. Conf. Rep. No. 105-803, at 13.

In other committee reports, committee hearings, and floor speeches, the same point was made again and again: Covered class actions involving nationally traded securities "could not be based on state law and could *only* be maintained in federal courts." S. Rep. No. 105-182, at 9-10 (emphasis added) (Congressional Budget Office cost estimate); *see also, e.g.*, H.R. Rep. No. 105-640, at 13 (same); *id.* at 45 (dissenting views) ("The bill requires *** class actions [involving covered securities] to be brought in federal court pursuant to federal law ***."); 143 Cong. Rec. S10,475 (daily ed. Oct. 7, 1997) (statement of Sen. Phil Gramm, primary sponsor and manager) ("What our bill does is very simply this. *** [I]f a stock is traded on the national market, *** then the class-action suit has to be filed in Federal court."); 144 Cong. Rec. H6060 (daily ed. July 21, 1998) (statement of Rep. Christopher Cox, cosponsor and manager) ("[T]his legislation will make federal courts the exclusive venue for large-scale securities fraud lawsuits involving securities subject to federal regulation ***."); *id.* at H10,771 (daily ed. Oct. 13, 1998) (statement of Rep. Bliley) ("The premise of [SLUSA] is simple: lawsuits alleging violations that involve securities that are offered nationally belong in Fed-

eral court."); *House Hearing*, *supra*, at 4 (statement of Rep. White) ("[The bill] mak[es] sure that class action suits with securities that are traded on the three major securities trading exchanges in our country have to be subject to the rules that we passed last time and have to go to Federal court.").

In short, Congress recognized that, to achieve uniformity, it would have to do more than preclude class actions involving covered securities from being brought under state law; Congress would also have to prevent such actions under the 1933 Act from being brought in state court. And that is exactly what the "except" clause does: It provides that such actions under the 1933 Act may be heard only in a federal forum.

To be sure, because the "except" clause applies to 1933 Act claims in *any* "covered class action" as defined in Section 16, it divests state courts of jurisdiction over 1933 Act claims in covered class actions involving *non*-covered securities, too. In that respect, the "except" clause is broader in scope than the preclusion provision. But there is nothing anomalous about that. The 1934 Act reflects a similar approach, making federal court the exclusive venue for all 1934 Act claims (including those involving *non*-covered securities) while precluding only certain state-law class actions involving *covered* securities. *See* 15 U.S.C. §§ 78aa(a), 78bb(f)(1). Moreover, the Reform Act's class-action-specific protections apply to all 1933 Act class actions—whether involving covered securities or not—so it makes sense that Congress would make the "except" clause similarly as broad. *See id.* § 77z-1(a)(1).

That Congress took a narrower approach with preclusion simply illustrates the deeper federalism concerns that preclusion raises. Preclusion prevents a state-law claim from being heard in any court whatsoever, affecting the federal-state balance more profoundly than requiring a federal claim to be heard in a federal forum. *See Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 431 (2010) ("[T]he National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." (internal quotation marks omitted)). So Congress crafted a "targeted" bill, precluding only those state-law class actions of greatest federal concern—and no others. *House Hearing*, *supra*, at 12 (statement of Rep. Anna G. Eshoo, cosponsor and manager); *see also* 143 Cong. Rec. S10,477 (daily ed. Oct. 7, 1997) (statement of Sen. Dodd) ("This legislation has been carefully crafted only to affect those types of class actions that are appropriately heard on the Federal level.").

The preclusion provision and the "except" clause thus work together to "enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227. Only by reading the "except" clause to divest state courts of jurisdiction over 1933 Act covered class actions like respondents' is that aim accomplished.

4. Finally, construing the "except" clause to except 1933 Act claims in covered class actions from state-court jurisdiction serves a goal that this Court has "consistently underscored in interpreting jurisdictional statutes": "administrative simplicity." *Merrill*

Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562, 1573, 1574 (2016) (internal quotation marks omitted). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.*

Requiring 1933 Act claims in covered class actions to be heard in federal court would be just such a rule. Courts would be able to determine whether an action arising under the 1933 Act belongs in federal court on the basis of a single factor: whether it meets the definition of a "covered class action." 15 U.S.C. § 77p(f)(2). And whether it does so will usually be clear from the face of the complaint. Indeed, because the inquiry is so straightforward, the parties will often agree—as they do here—that the definition is satisfied. *See* Br. in Opp. 3. For this reason, too, the Court should hold that the "except" clause divests state courts of concurrent jurisdiction over 1933 Act claims in covered class actions, including respondents' suit in this case.

II. ALTERNATIVE INTERPRETATIONS OF SLUSA SHOULD BE REJECTED

A. Respondents' Interpretation Cannot Be Squared With SLUSA's Text, Structure, History, Or Purposes

Respondents read the "except" clause of Section 22(a)'s jurisdictional provision differently. In their view, the "except" clause does not divest state courts of jurisdiction over any 1933 Act actions. Rather,

respondents argue, the clause serves a different purpose: to "reflect" the fact that, in Section 16(b), "Congress precluded certain *state law* securities class actions outright." Br. in Opp. 1. That reading cannot be squared with the text, structure, history, or purposes of SLUSA.

1. a. To begin, Section 16(b)'s preclusion provision makes no sense as the basis for an exception to Section 22(a)'s jurisdictional provision. That is because Section 16(b) is not about jurisdiction at all. It is about an entirely separate concept: "preclusion." *Kircher*, 547 U.S. at 636. It provides that certain class actions based on state law may not "be *maintained*" in "any" court, "State or Federal." 15 U.S.C. § 77p(b) (emphasis added). So when a state or federal court confronts such an action, it must dismiss the action as "nonactionable"—that is, for failure to state a claim upon which relief can be granted, not for lack of jurisdiction. *Kircher*, 547 U.S. at 636 n.1.

Respondents do not deny that Section 16(b) is about preclusion, not jurisdiction. Yet they insist that Congress amended Section 22(a)'s jurisdictional provision to "reflect [Section 16(b)'s] limitation on state court claims." Br. in Opp. 1. But if that limitation has nothing to do with jurisdiction, then that amendment accomplished nothing: The jurisdiction of state courts would be precisely the same, even if the twelve words added by the amendment—the "except" clause—were stricken. That is "at odds with one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and brackets omitted).

Indeed, if the text of the "except" clause means anything, it is that Congress "except[ed]" *some* category of 1933 Act claims from the concurrent "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a); *see supra* pp. 15-16. The fundamental flaw of respondents' position is that it renders that category an empty set; on their reading, the "except" clause would not divest state courts of jurisdiction over *any* 1933 Act claims at all. Theirs would be an "except" clause that creates no "except[ion]," making nonsense of the statutory text.

b. Respondents nevertheless maintain that they have the better reading of the "except" clause in light of the text of a *different* statute, the 1934 Act. Br. in Opp. 17. That statute's jurisdictional provision states that federal courts "shall have *exclusive jurisdiction*" over "all" 1934 Act claims. 15 U.S.C. § 78aa(a) (emphasis added). And according to respondents, Congress would have used the same words in Section 22(a) if it had wished to make federal courts the exclusive venue for 1933 Act claims in covered class actions.

Respondents infer too much from Congress's decision not to use the words "exclusive jurisdiction." For one thing, making use of those words would have entailed a major rewrite of Section 22(a)'s jurisdictional provision when just a minor revision sufficed. That is because Congress did not wish to make federal courts the exclusive venue for *all* actions arising under the statute, as in the case of the 1934 Act. Rather, it wanted to make federal courts the exclusive venue for *covered class actions*, while preserving the concurrent jurisdiction of state courts over *all other* 1933 Act claims. Creating a jurisdictional "except[ion]" for "covered class actions" was

the simplest way to achieve that narrow aim. *Id.* § 77v(a).

For another thing, Congress sometimes uses different words in different contexts to say the same thing. One need look no further than Section 22(a) itself. There, Congress described 1933 Act claims in two different ways: in the first sentence, as claims "brought to enforce any liability or duty created by this subchapter"; and in the penultimate sentence, as claims "arising under this subchapter." *Id.* Yet those two phrases mean the same thing. *See Manning*, 136 S. Ct. at 1568 & n.3. There is thus nothing strange about Congress using different words to define courts' jurisdiction. And the "mere possibility" that Congress could have used different "phrasing cannot defeat the most natural reading" of the "except" clause. *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012).

c. Respondents also observe that SLUSA's addition of the "except" clause to Section 22(a)'s jurisdictional provision appeared in a subsection of SLUSA captioned "Conforming amendments." Pub. L. No. 105-353, § 101(a)(3), 112 Stat. at 3230. In respondents' view, construing the "except" clause to divest state courts of jurisdiction over 1933 Act claims in covered class actions would give too much substance to something Congress labeled a "[c]onforming amendment[]." Br. in Opp. 20.

Respondents "place[] more weight on the 'Conforming Amendments' caption than it can bear." *Burgess* v. *United States*, 553 U.S. 124, 135 (2008). "Congress did not disavow any intent to make substantive changes" by applying that label. *Id.* Rather, the addition of the "except" clause was "conforming"

because it "harmonized" Section 22(a)'s jurisdictional provision with the rest of SLUSA's changes, *id.*—each one animated by the principle that plaintiffs should not be able to evade the Reform Act's protections by filing their class actions in state court. *See supra* pp. 16-20. Further, Congress devoted an entire title of SLUSA to what it called "clerical and technical amendments." Pub. L. No. 105-353, tit. III, § 301, 112 Stat. at 3235 (capitalization and boldface omitted). If Congress really meant the "except" clause to be nonsubstantive, it could have given it that label instead.

In any event, Congress's use of a particular label is no excuse to abandon "the usual tools of statutory construction." *United States* v. *R.L.C.*, 503 U.S. 291, 305 n.5 (1992) (plurality opinion). Here, "[t]reating the amendment[] as nonsubstantive would be inconsistent with [its] text." *Burgess*, 553 U.S. at 135. As explained above, the text of the "except" clause is most naturally read to "except" a category of cases ("covered class actions") from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a); *see supra* pp. 15-16. A label cannot change that. *See R.L.C.*, 503 U.S. at 305 n.5 (plurality opinion) ("[A] statute is a statute, whatever its label."). The fact remains that respondents' reading of the "except" clause has no basis in the statutory text.

2. Respondents' reading fares no better when placed within the context of SLUSA's amendments as a whole. Recall the three categories of covered class actions discussed above: (1) state-law covered class actions, (2) mixed covered class actions, and (3) 1933 Act covered class actions. *See supra* pp. 16-20. SLUSA's addition of a preclusion provision addresses the first category, and its amendment of

the anti-removal provision addresses the second, preventing state-law and mixed covered class actions from being used to evade the Reform Act's protections. SLUSA's addition of the "except" clause to the jurisdictional provision was thus meant to address the third category, preventing 1933 Act covered class actions from becoming vehicles of abuse as well.

But under respondents' reading, SLUSA did not address the third category at all. Rather, Congress was content to leave suits like this one, alleging only 1933 Act claims, mired in state court, where the Reform Act's provisions specific to class actions do not apply. Thus, on respondents' reading, SLUSA carefully closed two of the Reform Act's loopholes—for state-law and mixed covered class actions—but left a third wide open. That is hardly the "symmetrical and coherent regulatory scheme" that Congress presumably set out to create. *Gustafson*, 513 U.S. at 569.

3. Still, respondents insist that their interpretation of the "except" clause better reflects "Congress's purpose in enacting SLUSA." Br. in Opp. 17. Quoting from SLUSA's first line, *id.*, respondents assert that Congress had a singular "purpose": "to limit the conduct of securities class actions under *State law*." Pub. L. No. 105-353, 112 Stat. at 3227 (emphasis added). That was certainly *a* purpose of the legislation, but it was not the *only* one. Indeed, respondents cut off the quote too soon. The rest of the line continues: "*and for other purposes*." *Id.* (emphasis added).

Those "other purposes" reveal that Congress was concerned about more than "securities class actions under *State law*." *Id.* (emphasis added). As dis-

cussed above, Congress was concerned about securities class actions alleging 1933 Act claims, too. *See supra* pp. 20-30. Congress feared that an increasing number of such 1933 Act claims were being filed in state, rather than federal, court. *See supra* pp. 21-22. And Congress sought to stem that shift by "mak[ing] Federal court the exclusive venue for most securities class action lawsuits." H.R. Conf. Rep. No. 105-803, at 13. Respondents' reading of the "except" clause, however, would not advance that purpose. It would instead cause 1933 Act covered class actions to be stuck where plaintiffs file them—in state court.

Nor would respondents' reading fulfill another one of Congress's purposes: "to enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat. at 3227. To be sure, precluding certain "*state law* securities claims" is a step toward that goal. Br. in Opp. 17. But as explained above, preclusion ensures only that such claims will be governed by uniform *substantive* standards; it does not guarantee that they will be governed by uniform *procedural* ones. *See supra* pp. 24-29. And Congress understood that procedure is as important as substance. *See supra* pp. 25-28. That is why it included so many procedural protections in the Reform Act. *See* 15 U.S.C. § 77z-1. Under respondents' interpretation of the "except" clause, however, plaintiffs could insist on bringing 1933 Act covered class actions in state court, subjecting defendants to "[d]isparate, and shifting, state litigation procedures." S. Rep. No. 105-182, at 3 (internal quotation marks omitted). Class actions involving nationally traded securities would thus not be governed by national standards after all.

4. Finally, respondents (Br. in Opp. 19-20) lean on the "presumption in favor of concurrent state court jurisdiction" in "cases arising under federal law." *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) (internal quotation marks omitted). "Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption * * * can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin* v. *Levitt*, 493 U.S. 455, 459-460 (1990) (internal quotation marks omitted).

Each of those markers is present here. The text of the "except" clause contains an explicit statutory directive "except[ing]" 1933 Act "covered class actions" from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a). The unmistakable implication from SLUSA's legislative history is that Congress meant to "make[] Federal court the exclusive venue for most securities class action lawsuits." H.R. Conf. Rep. No. 105-803, at 13. And state-court jurisdiction is clearly incompatible with federal interests in preventing evasion of the Reform Act's protections and "protecting the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 547 U.S. at 78. Accordingly, the presumption of concurrent jurisdiction has been overcome. Respondents' interpretation of the "except" clause should be rejected.

B. Though Better Than Respondents', The United States' Interpretation Is Still Not The Best

1. Like respondents, the United States contends that SLUSA did not divest state courts of jurisdiction over 1933 Act covered class actions such as this one. U.S. Cert. Br. 6. But unlike respondents, the United States maintains that defendants in such actions should have "access to a federal forum." *Id.* at 13. According to the United States, the "statutory mechanism for ensuring such access" is removal. *Id.* The United States construes Section 16(c), which SLUSA added, as authorizing the removal of not just *state-law* covered class actions described in Section 16(b), but also *1933 Act* covered class actions that meet the same description—namely, that allege a particular type of wrongdoing in connection with a covered security. *Id.* at 13-14. And in the United States' view, Section 22(a)'s anti-removal provision does not bar the removal of such 1933 Act actions because SLUSA created an "[e]xcept[ion]" to that provision for cases removable under Section 16(c). *Id.* at 13. The upshot is that 1933 Act suits like respondents' can be removed to federal court.

The position of the United States is certainly more faithful to the statutory scheme than that of respondents. To its credit, the United States recognizes that "the efficacy of [the Reform Act's] requirements depends on defendants' access to a federal forum." *Id.* It insists that SLUSA should be construed to "provide[] appropriate protection against the use of state-court lawsuits to circumvent [the Reform Act's] safeguards." *Id.* at 6. And it proposes an interpretation that would allow at least some

1933 Act covered class actions filed in state court to enjoy the protection of those safeguards through removal. *Id.* at 13-14. Respondents, by contrast, urge an interpretation that would keep those actions in state court, where most of the Reform Act's protections, including all those specific to class actions, do not apply. Br. in Opp. 16-22. If adopted, respondents' position would thus do far more harm to the statutory scheme than the United States'.

2. But while the United States' position is an improvement over respondents', it still does not reflect the best reading of the statute. The problem lies in the United States' reading of the "except" clause. The United States resists reading that clause to do what it says it does: "except" a category of 1933 Act actions ("covered class actions") from the "concurrent" "jurisdiction" of "State" courts. 15 U.S.C. § 77v(a). Instead, the United States offers two alternative readings, each premised on the same mistakes.

First, the United States proposes reading the "except" clause as "mak[ing] clear" that "state courts may not entertain any state-law claims barred by Section [16(b)]" in "hybrid class actions that contain both 1933 Act claims and state-law claims within the scope of Section [16(b)]." U.S. Cert. Br. 11-12. That reading, however, rests on a faulty premise: that Section 16(b) itself is a "jurisdictional" provision, which divests state courts of jurisdiction over certain state-law claims. *Id.* at 6; *see also id.* at 9 (referring to "SLUSA's divestiture of state-court jurisdiction * * * with respect to state-law claims"). In fact, as explained above, Section 16(b) concerns "preclusion," not jurisdiction, so it has no bearing on the concurrent jurisdiction of state courts at all. *Kircher*, 547

U.S. at 636; *see also id.* at 646 ("[A] defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body) to make the preclusion determination." (citation omitted)); *supra* pp. 32-33.

But even assuming, for the sake of argument, that Section 16(b) were a jurisdictional provision, its effect would not be limited to "*state* courts," as the United States suggests. U.S. Cert. Br. 12 (emphasis added). After all, Section 16(b) says that certain state-law claims may not "be maintained in any State *or Federal* court." 15 U.S.C. § 77p(b) (emphasis added); *see also* U.S. Cert. Br. 7 (acknowledging that Section 16(b) "precludes both state and federal courts from hearing the specified state-law class actions"). That renders the United States' proposed reading even more implausible. For if Congress were really intent on "mak[ing] clear" the supposed jurisdictional implications of Section 16(b), U.S. Cert. Br. 12, it would not have written an "except" clause that applied only to the jurisdiction of *state* courts; it would have written an "except" clause that applied to the jurisdiction of *federal* courts, too. Indeed, Congress could have easily done so, simply by placing the "except" clause at the very beginning or the very end of Section 22(a)'s first sentence. The fact that Congress did not do so just shows that the United States' reading cannot be right.

Second, the United States suggests that "Congress may have added the 'except' clause to Section [22(a)] in a more general excess of caution, as a way of ensuring that nothing in the 1933 Act's general jurisdictional provision would be taken to supersede SLUSA's limits on state-court jurisdiction." *Id.* But this reading, too, rests on the erroneous premise that

Section 16(b) imposes a "jurisdiction[al]" limit. *Id.* And it, too, errs by ignoring that any jurisdictional limit imposed by Section 16(b) would necessarily apply not just to "*state*" courts, but to *federal* courts as well. *Id.* (emphasis added). Thus, if Section 16(b) really did impose jurisdictional limits, and if Congress really had wanted to ensure that nothing in Section 22(a) would be "taken to supersede" those limits, *id.*, Congress would not have put the "except" clause where it did, in a place where it modifies only the jurisdiction of *state* courts. Both of the United States' proposed readings of the "except" clause thus suffer from the same flaws.

3. Also flawed are the United States' reasons for *not* construing the "except" clause as divesting state courts of jurisdiction over 1933 Act claims in covered class actions. According to the United States, that reading is one that the "language will not bear." *Id.* at 9. That is because, the United States says, "nothing in Section [16]" "even arguably 'provide[s]' an exception to the general rule of concurrent jurisdiction." *Id.* at 8 (quoting 15 U.S.C. § 77v(a)).

But the United States assumes that what Section 16 must "provide[]" is an *exception*. It is the "except" clause itself, though, that provides the exception. It is the "except" clause itself, in other words, that divests state courts of jurisdiction over some category of 1933 Act actions. What Section 16 must "provide[]" is a *definition*, or else that category would go undefined. *See supra* pp. 15-16. And Section 16 does in fact "provide[]" a definition of a "covered class action," the term the "except" clause uses. 15 U.S.C. § 77p(f)(2). Construing the "except" clause to divest state courts of jurisdiction over 1933 Act claims in covered class actions is thus a perfectly natural way

to read the text—and certainly more natural than construing the "except" clause as not excepting *any* 1933 Act claims from state-court jurisdiction at all. Indeed, given the United States' willingness to construe the "[e]xcept[ion]" to the *anti-removal* provision as encompassing certain 1933 Act claims, *see supra* p. 39, there is no reason the United States should be unwilling to construe the "except[ion]" to the *jurisdictional* provision as encompassing *at least* those same 1933 Act claims, including respondents' claims in this case.

Finally, the United States observes that SLUSA's preclusive effect with respect to state-law claims extends only to covered class actions alleging particular types of wrongdoing involving covered securities. U.S. Cert. Br. 9-10; *see* 15 U.S.C. § 77p(b). According to the United States, there is "no evident reason that Congress would have wished SLUSA's divestiture of state-court jurisdiction to sweep more broadly" so as to encompass *all* covered class actions under the 1933 Act. U.S. Cert. Br. 9.

Actually, there is no evident reason that Congress would have wished the scope of the preclusion provision and the scope of the "except" clause to be *the same*. After all, preclusion and jurisdiction are two different things. And as explained above, it is perfectly reasonable that Congress would tread more lightly in precluding claims based on state law than in requiring a federal forum for claims arising under federal law. *See supra* p. 30. Indeed, given that under the 1934 Act the divestiture of state-court jurisdiction similarly sweeps more broadly than the preclusion of state-law claims, *see* 15 U.S.C. §§ 78aa(a), 78bb(f)(1), the structure of the 1933 Act should hardly be surprising. *See supra* p. 29. In any

event, if the United States thinks Cyan reads the "except" clause too broadly, there is a simple alternative: It could construe that clause as limited to the same 1933 Act claims—alleging particular types of wrongdoing in connection with covered securities—which it says can be removed to federal court under Section 16(c) and the "[e]xcept[ion]" to the anti-removal provision.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

BORIS FELDMAN
Counsel of Record
IGNACIO E. SALCEDA
GIDEON A. SCHOR
AARON J. BENJAMIN
WILSON SONSINI GOODRICH & ROSATI PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, CA 94304
(650) 493-9300
boris.feldman@wsgr.com

NEAL KUMAR KATYAL
FREDERICK LIU
DANIEL J.T. SCHUKER
ALLISON K. TURBIVILLE
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for Petitioners

AUGUST 2017

ADDENDUM

ADDENDUM

STATUTORY PROVISIONS INVOLVED

Section 1 of the Securities Act of 1933 (1933 Act), 15 U.S.C. § 77a, provides:

Short title

This subchapter may be cited as the "Securities Act of 1933".

Section 16 of the 1933 Act, 15 U.S.C. § 77p, provides:

Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves—

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with re-

spect to the sale of securities of the issuer that—

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the gov-

ernment of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through

one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means—

(i) any single lawsuit in which—

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

Section 18 of the 1933 Act, 15 U.S.C. § 77r, provides in pertinent part:

Exemption from State regulation of securities offerings

* * *

(b) Covered securities

For purposes of this section, the following are covered securities:

(1) Exclusive Federal registration of nationally traded securities

A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock

Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B).

(2) Exclusive Federal registration of investment companies

A security is a covered security if such security is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940.

* * *

Section 22 of the 1933 Act, 15 U.S.C. § 77v, provides:

Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this

subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. In any action or proceeding instituted by the Commission under this subchapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure shall not apply to a subpoena issued under the preceding sentence. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) Contumacy or refusal to obey subpena; contempt

In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Extraterritorial jurisdiction

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Section 27 of the 1933 Act, 15 U.S.C. § 77z-1, provides:

Private securities litigation

(a) Private class actions

(1) In general

The provisions of this subsection shall apply to each private action arising under this subchapter that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.

(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that—

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this subchapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including

providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this subchapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve, or served, as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4).

(B) Nonwaiver of attorney-client privilege

The certification filed pursuant to subparagraph (A) shall not be construed to be a waiver of the attorney-client privilege.

(3) Appointment of lead plaintiff

(A) Early notice to class members

(i) In general

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class—

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

(ii) Multiple actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i).

(iii) Additional notices may be required under Federal Rules

Notice required under clause (i) shall be in addition to any notice required pursuant to the Federal Rules of Civil Procedure.

(B) Appointment of lead plaintiff

(i) In general

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the "most adequate plaintiff") in accordance with this subparagraph.

(ii) Consolidated actions

If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter has been

filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered. As soon as practicable after such decision is rendered, the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions in accordance with this subparagraph.

(iii) Rebuttable presumption

(I) In general

Subject to subclause (II), for purposes of clause (i), the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this subchapter is the person or group of persons that—

(aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

(bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and

(cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

(II) Rebuttal evidence

The presumption described in subclause (I) may be rebutted only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff—

(aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

(iv) Discovery

For purposes of this subparagraph, discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.

(v) Selection of lead counsel

The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.

(vi) Restrictions on professional plaintiffs

Except as the court may otherwise permit, consistent with the purposes of this section, a person may be a lead plaintiff, or an officer, director, or fiduciary of a lead plaintiff, in no more than 5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period.

(4) Recovery by plaintiffs

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of the class.

(5) Restrictions on settlements under seal

The terms and provisions of any settlement agreement of a class action shall not be

filed under seal, except that on motion of any party to the settlement, the court may order filing under seal for those portions of a settlement agreement as to which good cause is shown for such filing under seal. For purposes of this paragraph, good cause shall exist only if publication of a term or provision of a settlement agreement would cause direct and substantial harm to any party.

(6) Restrictions on payment of attorneys' fees and expenses

Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.

(7) Disclosure of settlement terms to class members

Any proposed or final settlement agreement that is published or otherwise disseminated to the class shall include each of the following statements, along with a cover page summarizing the information contained in such statements:

(A) Statement of plaintiff recovery

The amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis.

(B) Statement of potential outcome of case

(i) Agreement on amount of damages

If the settling parties agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement concerning the average amount of such potential damages per share.

(ii) Disagreement on amount of damages

If the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this subchapter, a statement from each settling party concerning the issue or issues on which the parties disagree.

(iii) Inadmissibility for certain purposes

A statement made in accordance with clause (i) or (ii) concerning the amount of damages shall not be admissible in any Federal or State judicial action or administrative proceeding, other than an action or proceeding arising out of such statement.

(C) Statement of attorneys' fees or costs sought

If any of the settling parties or their counsel intend to apply to the court for an award of attorneys' fees or costs from any fund established as part of the settlement, a statement indicating which parties or counsel intend to make such an application, the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought.

(D) Identification of lawyers' representatives

The name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members concerning any matter contained in any notice of settlement published or otherwise disseminated to the class.

(E) Reasons for settlement

A brief statement explaining the reasons why the parties are proposing the settlement.

(F) Other information

Such other information as may be required by the court.

(8) Attorney conflict of interest

If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether such ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

(b) Stay of discovery; preservation of evidence

(1) In general

In any private action arising under this subchapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon the motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(2) Preservation of evidence

During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for produc-

tion of documents from an opposing party under the Federal Rules of Civil Procedure.

(3) Sanction for willful violation

A party aggrieved by the willful failure of an opposing party to comply with paragraph (2) may apply to the court for an order awarding appropriate sanctions.

(4) Circumvention of stay of discovery

Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.

(c) Sanctions for abusive litigation

(1) Mandatory review by court

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanc-

tions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(3) Presumption in favor of attorneys' fees and costs

(A) In general

Subject to subparagraphs (B) and (C), for purposes of paragraph (2), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) Rebuttal evidence

The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) Sanctions

If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(d) Defendant's right to written interrogatories

In any private action arising under this subchapter in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the

jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.